

**COMMENTS ON  
THE GENDER PAY GAP, EQUALITY and EQUITABLE BRIEFING  
LOOKING BACK AND FORWARD**

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This paper follows Dr Kylie Weston-Scheuber's excellent paper, *Equitable Briefing and Equitable Remuneration: Briefing and Pay Disparity Through a Gender Lens – the Way Forward* and provides a few additional comments and reflections on progress (or lack thereof) over the past 24 years.

For more than 20 years, women have accounted for around two-thirds of law school graduates in New South Wales. This also appears to be consistent with other States and the Territories.

In 2000, 5,322 (34.6%) of solicitors in New South Wales were women.<sup>2</sup> There were 239 (12.4%) women barristers practising in New South Wales. This included six women senior counsel. The very low numbers of women barristers and the barriers to a career at the Bar were addressed by the Honourable Justice Mary Gaudron KC (the first woman silk in New South Wales and the first woman appointed to the High Court) in a keynote speech for the Women Lawyers Association (NSW) in 2002. She said:

The merit fiction is by no means the sole deterrent to women's success at the bar. Perhaps the most significant barrier is patronage. Patronage still governs who gets the chambers and where; it still governs the passing of briefs, the selection of juniors and, to the extent briefing patterns result from recommendations, briefing itself [...] Patronage is about creating people in one's own image, about perpetuating the status quo, securing conformity, protecting the prevailing ethos and stifling originality of thought. Patronage means that merit is not the sole criterion for success; it explains why, for some, mere incompetence is no handicap and, for others, outstanding ability is no guarantee against failure.<sup>3</sup>

### **The National Attrition and Re-engagement Study**

In November 2012, the Law Council of Australia engaged Urbis to undertake a National Attrition and Re-engagement Study (**NARS**) to investigate and analyse the drivers for the

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<sup>2</sup> Law Society of NSW, '2015 Profile of the Solicitors of NSW' (Final Report prepared by Urbis, May 2016).

<sup>3</sup> The Honourable Justice Mary Gaudron, 'Speech for Women Lawyers Association of New South Wales 50<sup>th</sup> Anniversary Gala Dinner' (Address presented at NSW Parliament House on 13 June 2002).

attrition of women from the legal profession in Australia.<sup>4</sup> At that time, there were various sources of information concerning the participation of women in the legal profession<sup>5</sup> but there was a comparative lack of research into the reasons for attrition among women lawyers in the Australian context.

The objectives of the NARS research were to:

- explore the drivers of attrition, retention and re-engagement of women in the legal profession, and understand how these may differ compared to male lawyers;
- explore the experiences and motivators of different cohorts of women, considering practising status, type of employment, stage of career and life stage; and
- identify factors that may assist in retaining or re-engaging women in private practice, the Bar and the profession as a whole.<sup>6</sup>

The survey was conducted in 2013. The Final NARS Report was launched at the National Press Club on 14 March 2014.<sup>7</sup>

At the time the NARS Report was released, in 2014 there were 13,371 (48.5%) of solicitors practising in New South Wales were women.<sup>8</sup> By 2014 women solicitors practising in New South Wales had grown by 508% since 1988.<sup>9</sup> By June 2015, there were 475 (20.95%) women barristers practising in New South Wales with 37 women senior counsel. The disparity between the numbers of women solicitors and barristers was no surprise.

### **Reluctance to practise as a barrister**

The NARS Report found only a small proportion (16%) of women legal practitioners indicated they would consider working at the Bar. None of the women (or men) who had ceased practising indicated they would consider moving to the Bar. Male solicitors working

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<sup>4</sup> Law Council of Australia, *Law Council of Australia to undertake a National Attrition and Re-engagement Study Final Report (NARS Report)* (March 2014) 4.

<sup>5</sup> Some of the relevant studies included the *Keys Young Report* 1995, the Victorian Bar Council Report 1999, the Law Council Court Appearance Survey 2009, and the 2012 VEOHRC Report *Changing the rules: the experiences of female lawyers in Victoria*.

<sup>6</sup> NARS Report, 4.

<sup>7</sup> It is beyond the scope of this paper to examine all the findings of the NARS Report. Rather my purpose is to focus on the findings relevant to the reasons for the gender pay gap, and to examine what has changed in the past decade to respond to those findings.

<sup>8</sup> Law Society of NSW, *2015 Profile of the Solicitors of NSW* (Final Report prepared by Urbis, May 2016).

<sup>9</sup> Law Society of NSW, *Thought Leadership Project on the Advancement of Women* (2014).

in private practice were over twice as likely as women to consider a future move to the Bar (12% and 5% respectively).<sup>10</sup>

In 2014, women practitioners who would or might consider the Bar were more likely to:

- be aged 34 years and under (20%) than 35 years and over (11%);
- have no children (19%) than be the primary carer or shared carer of children (11%);
- work full-time (18%) rather than part-time (8%);
- have five years or less practising experience (25%) than more than five years of practising experience (9%).<sup>11</sup>

Women were more likely than men to report the following as reasons for not considering a move to the Bar:

- family commitments (6% and 1% respectively);
- long hours/the hours/lack of flexibility (7% and 2% respectively).<sup>12</sup>

Another barrier was the culture of the legal profession, particularly in private practice and at the Bar.<sup>13</sup> The perception is that the profession is:

- male-dominated, ‘blokey’ and a ‘boys club’;
- elitist, exclusive and places too great a value on money;
- overly competitive, promotes aggressive behaviour and discourages collaboration and nurturing.

The main ‘pull factors’ for the Bar included the independence, the nature of the work and the status. The Bar was also identified as providing greater flexibility associated with working independently. Some saw this as a key benefit of working at the Bar.<sup>14</sup>

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<sup>10</sup> NARS Report, 45.

<sup>11</sup> NARS Report, 50.

<sup>12</sup> NARS Report, 52.

<sup>13</sup> NARS Report, 35.

<sup>14</sup> NARS Report, 24.

However, women barristers were more satisfied with their level of independence (88%) and reported greater personal satisfaction in their work (81%) compared to women in private and in-house roles.<sup>15</sup>

The NARS Report cited the following reasons for women barristers leaving the Bar (36 women responded to the survey on this issue):

- taking time out from the profession (parental leave) (33%);
- better work-life balance (25%);
- more flexibility to balance work and personal responsibilities (19%);
- looking for a change/something new (19%); and
- mental or physical health reasons (19%).<sup>16</sup>

### **Concerns about reliable and secure income at the Bar**

Some survey NARS participants reported that a significant barrier to working or considering working at the Bar was the financial strain of commencing and sustaining a career as a barrister. There was awareness of the considerable investment required to establish and maintain chambers. This was considered a barrier to entering and remaining at the Bar, particularly for women taking parental leave or returning to work part-time. The financial impacts were compounded when coupled with the irregularity of income.

For those women who practised as barristers, they were more dissatisfied with the stability and reliability of their income (41%) and job security (30%) than women in private practice (10% and 15% respectively) and in-house (9% and 18% respectively). The NARS Report noted that this was not unexpected given barristers run their own practice.<sup>17</sup>

The NARS Report noted that women barristers reported bias in briefing practices, based on both client and colleague perceptions which in turn impacted their income. On the issue of income for barristers, the NARS Report noted the prevalence of conscious and unconscious bias in briefing practices when women barristers were denied briefs because of a client preference for male counsel.<sup>18</sup>

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<sup>15</sup> NARS Report, 19.

<sup>16</sup> NARS Report, 42.

<sup>17</sup> NARS Report, 20.

<sup>18</sup> NARS Report, 80.

## **Acknowledging a gender pay gap**

In response to the NARS Report in 2014, the NSW Bar Association surveyed annual fee income, receiving responses from 50% of its members. The data revealed a gender pay gap.

The survey found:

- the average fees for male barristers were \$437,450 and \$269,958 for women barristers;
- 41% of women barristers earned gross fees under \$200,000 compared to 24% of male barristers;
- the pay gap for women barristers with under 5 years at the Bar was \$29,377.

The survey revealed hours of work did not explain the gap, as male and female survey participants recorded similar hours worked per week.

While these differences are stark, they must be read in context. Men were generally older and had been established at the New South Wales Bar for longer compared to women barristers. The gap between annual fees charged by men and women counsel may also be due to differences in the level of seniority of the counsel. In his commentary on these findings, Ingmar Taylor SC suggested the gender pay gap reflected the underrepresentation of women as senior counsel, the lower average length of time women counsel had been at the Bar, and that, on average, women charged a lower hourly rate than men at the same seniority.<sup>19</sup>

The disparity in the average gross annual fees was a clear indicator that women were not receiving access to either the number or the kind of briefs that their male counterparts were receiving. It also highlighted a significant gender pay gap. The gender pay gap is the difference in average earnings between women and men, either by hourly rates of pay or annual remuneration. It compares how we value the work of women and men across organisations, industries, and the workforce as a whole.

## **Responding to the gender pay gap**

The Law Council's Equitable Briefing Policy released in June 2016<sup>20</sup> was one of the key initiatives to address equality, access and the gender pay gap for women barristers. It is

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<sup>19</sup> Ingmar Taylor SC, 'What do women barristers earn?' (2016) *Bar News* 48 at 50.

<sup>20</sup> Law Council of Australia, *Equitable Briefing Policy* (June 2016) (as updated).

voluntary and establishes a target for adoptees to brief women barristers in at least 30% of all briefs and pay them at least 30% of the total value of all brief fees.<sup>21</sup>

For barristers, the Law Council of Australia's Equitable Briefing Policy Annual Reports provide another helpful, yet incomplete, picture of the gender pay gap.

The most recent report found the value of women barristers' fees was 20% of the total value of brief fees despite receiving 31% of briefs:

- **Total value of briefs:** \$1,652,892,082.73
- **Women barristers:** \$337,453,275.73 (20%)
- **Men barristers:** \$1,315,438,807.00 (80%)<sup>22</sup>

The Law Council's annual reports have been a helpful tool in tracking and understanding the causes and areas where gender pay gaps continue. Beyond these reports, the lack of data on the gender pay gap at the Bar presents a significant obstacle to identifying trends, causes and effective remedies. Of the available data sources, methods of collecting data are inconsistent or not representative, and attract issues of reliability.

Recent data from 30 June 2024 shows that 18,844 (55.3%) of the solicitors practising in New South Wales are women.<sup>23</sup> Over the past 10 years, this represents a net increase of 547 women solicitors annually. From the Bar's perspective, this also represents a significantly larger source of solicitors who may be making briefing decisions.

As at 14 October 2024, there are 634 (26.16%) women barristers practising in New South Wales with 64 women senior counsel.<sup>24</sup> This includes 8 women appointed on 5 October 2024. Over the past 10 years, the net increase of women barristers is 16 annually.<sup>25</sup> While there is progress, it remains slow.

Women appearances in superior courts are below the proportion of women at the Bar, except in criminal law. In 2022-23, for matters in which judgment was delivered by five or more

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<sup>21</sup> Law Council of Australia, 'Equitable Briefing Policy' (Web page, 11 October 2024).

<sup>22</sup> Law Council of Australia, *Equitable Briefing Policy Annual Report 2022-2023* (Report, 2023) 16.

<sup>23</sup> Law Society of NSW, 'Practising Solicitor Statistics' (as at 30 June 2024).

<sup>24</sup> New South Wales Bar Association, 'Statistics' (as at 14 October 2024).

<sup>25</sup> Some of the attrition may be explained by the appointment to judicial positions of 48 of 118 women Senior Counsel (appointed between 1981 and 2024).

Justices of the High Court, women comprised 22% of appearances, and only 15% of counsel addressing the Court in oral submissions.<sup>26</sup> Three prominent male senior counsel from the NSW Bar addressed the High Court more times than all women combined.

### **Gender pay gap beyond the Bar**

Barristers are not alone when it comes to gender pay gaps. The Workplace Gender Equality Agency (WGEA) reports the average total remuneration gender pay gap in Australia is 21.7%.<sup>27</sup> Every industry and almost three-quarters (73%) of employers in Australia have a pay gap that favours men.<sup>28</sup> According to ABS data, fifty additional workdays for women per year are required to catch up to men.<sup>29</sup>

The WGEA data includes the legal profession. Out of the 69 reporting legal workplaces, 34 had a pay gap greater than the national average. The pay gaps range from 0% to 50.1% for all legal workplaces and 9.8% to 18.6% for the T-6 law firms.<sup>30</sup>

The College of Law Australian Legal Survey 2024 reported the average base salary gender pay gap across legal professionals (not including barristers) as 10%. The survey found this was not a legacy issue: the gap existed at all levels from graduate through to principal.<sup>31</sup>

Similarly, the NSW Annual Profile of Solicitors revealed a gender pay gap was present across all sectors of practice (even women-dominated sectors), age groups and year of admission of NSW solicitors.<sup>32</sup> Despite comprising 55% of all solicitors in NSW, women continue to be underrepresented in senior leadership; for example, in private practice only

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<sup>26</sup> The Honourable Justice Jacqueline Gleeson, *Women in Law: How far have we come, and where to from here?* (Brennan Program Justice Talks Address, delivered at the University of Technology Sydney, 20 March 2023) 19.

<sup>27</sup> Workplace Gender Equality Agency, *WGEA Gender Equality Scorecard 2022-23* (November 2023) 5.

<sup>28</sup> *Ibid.*

<sup>29</sup> Mary Wooldridge, 'This Gender Pay Day, employers must take action for their own good' *Workplace Gender Equality Agency* (Web page, 19 August 2024).

<sup>30</sup> Workplace Gender Equality Agency, 'WGEA Data Explorer' (Webpage, November 2023); Naomi Neilson and Jerome Doraisamy, 'What the gender pay gap looks like at Australia's biggest firms' *Lawyers Weekly* (Article, 27 February 2024).

<sup>31</sup> College of Law, *Australian Legal Salary Survey 2024* (23 May 2024) 8.

<sup>32</sup> Law Society of New South Wales, *2023 Annual Profile of Solicitors NSW* (Report prepared by Urbis, 4 June 2024), 2.

29% of women were principals compared to 52% of men.<sup>33</sup> This shapes their earning capacity, with 7% fewer women than men earning more than \$150,000.<sup>34</sup>

### **Australia is not alone**

In November 2023, the Bar Council of England and Wales published its Barrister earnings by sex and practice area report.<sup>35</sup> In summary:

- in every call band and every area of practice, male barristers' median gross earnings were higher than women's;
- the disparity in gross earnings between sexes was present at the very start of a career (17%) and quickly increased. The gap between men's and women's median gross earnings is greatest at the 11-15 years call band (30%);
- women silks earn on average 71% of their male colleague's median gross earnings;
- whilst men's and women's gross earnings had both slightly increased over the last year, the difference in gross earnings between men and women had not narrowed.

The report commented:

Everyone at the Bar should be concerned that the disparities are so great, and are apparently not reducing. We need to do more work to understand the cause or causes of these striking differences. Some may be accounted for by differences in the number of hours worked per week, and we will be analysing what people have said about that in the Barristers' Working Lives 2023 responses. But it is a particular concern that these differences seem to emerge at such an early stage in practice, because the danger is that the patterns set in the early years of practice become self-perpetuating. We must keep our focus on how work is distributed across the Bar, as this has such a significant impact on who can build and sustain a thriving practice.<sup>36</sup>

In April 2024, the Bar Council of England and Wales reported that unconscious bias continues to be a barrier for women barristers, referring to the gendered nature of exceptionalism and perceptions of excellence at the UK Bar. The report found that 'stars at the Bar' who get access to 'unicorn', career-defining work are majority men.<sup>37</sup> The report cited recent Harvard research that suggests men and women may be judged differently due to bias rather than actual excellence.

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<sup>33</sup> Ibid, 5, 7.

<sup>34</sup> Ibid, 52.

<sup>35</sup> Bar Council of England and Wales, *Gross earnings by sex and practice area at the self-employed Bar* (November 2023).

<sup>36</sup> Ibid, 19.

<sup>37</sup> Bar Council of England and Wales, *New practitioner earnings differentials at the self-employed Bar* (April 2024) 34, referring to Harvard Business Review 'A study used sensors to show that men and women are treated differently at work' (Web page, 2017).



For women barristers of colour, the effect of unconscious and conscious bias resulted in women barristers from minority ethnic backgrounds being the lowest earning group amongst barristers at the England and Wales Bar, earning 41% of the average income of white male barristers.<sup>38</sup>

Young women barristers at the England and Wales Bar were more likely to underbill (not uncommonly up to half the actual bill) due to a reluctance to charge the full amount, a greater willingness to do unpaid or pro bono work and underestimation of the hours spent. The report also discussed the presence of a confidence gap between men and women barristers in setting their hourly rates.<sup>39</sup>

### **The future**

The comparison between the number of women practising as solicitors compared to barristers is stark. It is fair to say the Bar has not attracted women legal practitioners. The recruitment issues identified in the NARS Report 10 years ago, continue to be reasons why women are reluctant to come to the Bar.<sup>40</sup> While there remains much to celebrate, there is more work to do!

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<sup>38</sup> Bar Standards Board, *Income at the Bar – by Gender and Ethnicity* (February 2022) 5.

<sup>39</sup> Bar Council of England and Wales, *New practitioner earnings differentials at the self-employed Bar* (April 2024) 32-3.

<sup>40</sup> NARS Report, 7, 76.